Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JERRY R. FENT AND MARGARET B. FENT,

Petitioners,

v.

OKLAHOMA CAPITOL IMPROVEMENT AUTHORITY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Do the nine Oklahoma Supreme Court judges setting in judgment of their own 42 million dollar bond issue for construction of a new Oklahoma Supreme Court building violate the Petitioners' due process rights to a fair trial by the "possible temptation" test of the U.S. Supreme Court?

II. Does the "Rule of Necessity" making denial of a post-recusal judicial replacement mechanism for the Oklahoma Supreme Court judges deny the Petitioners' due process and equal protection of laws where other parties' trials are permitted substitute judges upon recusal but the petitioners are stuck with bias judges?

III. Is the creation of a separate but equal debt form for the payment of moral bonds being used for the purposes of a denial of Petitioners' right to vote upon debt and a denial of due process clause of the Fourteenth Amendment, United States Constitution?

PARTIES TO THE PROCEEDING BELOW

The caption of the case does not include the names of all parties:

1. The party, Edwin Kessler, Pro Se, Oklahoma Common Cause opponent, appearing in the proceedings below is not included in the caption of the case.

CORPORATE DISCLOSURE STATEMENT

(No nongoverment corporations are a part of this case as either petitioner or respondent.)

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners Jerry R. Fent and Margaret B. Fent respectfully pray that a writ of certiorari be issued to review the three decisions of the Supreme Court of the State of Oklahoma setting as a court of original trial jurisdiction.

OPINIONS BELOW

The Opinion of the Supreme Court of the State of Oklahoma (filed April 20, 1999) denying recusal is reprinted in the Appendix to this Petition at App. 1. The opinion of the Supreme Court of Oklahoma (filed June 28, 1999) denying the Petitioners' right to vote is reprinted in the Appendix at App. 13. The Order of the Supreme Court of Oklahoma denying the Petitioners' application for a rehearing (filed July 13, 1999) is reprinted in the Appendix to the Petition at App. 53. The opinions have been designated for future publication and is reported at 1999 OK 64, ___ P.2d ___.

JURISDICTION

The Order of the Supreme Court of the State of Oklahoma, being the state court of last resort in civil cases, denied the Petitioners' application for a rehearing on July 13, 1999. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1257 and U.S. Sup. Ct. Rule 13.

FEDERAL AND STATE CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND OTHER AUTHORITIES INVOLVED

1. Fifth Amendment to the Constitution of the United States provides:

Amendment V.

"No person shall be * * * , nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Fourteenth Amendment to the Constitution of the United States provides:

Amendment XIV.

"SECTION 1. * * * . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Constitution of the State of Oklahoma, Article 10, § 23 provides in pertinent part:

§ 23. Balanced budget – Procedures

"The **state shall never create** or authorize the creation of **any debt or obligation**, or fund or pay any deficit, against the state, or any department, institution or agency thereof, **regardless of the form**, or the source of money from which it is to be paid, **except** as may be provided in this section and in Sections 24 and 25 of Article X of the Constitution of the State of Oklahoma. . . . " (Emphasis supplied)

4. Constitution of the State of Oklahoma, Article 10, § 24 provides:

§ 24. Debts in case of invasion, insurrection, or war

"In addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection or to defend the State in war; but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatsoever.

5. Constitution of the State of Oklahoma, Article 10, § 25 provides:

§ 25. Authorization of debt – Annual tax – Submission to voters – Final passage

"**Except** the debts specified in sections twenty-three and twenty-four of this article, no debts shall be hereafter contracted by or on behalf of this State, unless such debt shall be authorized by law for some work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty-five years from the time of the contracting thereof. **No such law** shall take effect until it shall, at a general **election, have** been submitted to the people and have received a majority of all the votes cast for and against it at such election. On the final passage of such bill in either House of the Legislature, the question shall be taken by yeas and nays, to be duly entered on the journals thereof, and shall be: "Shall this bill pass, and ought the same to receive the sanction of the people"? (Emphasis supplied)

6. Okla. Stat. Tit. 20, App. 20, Rule 9(c) (West 1991) in part, states:

   Rule 9. Disqualification of judge – Assignment of successor – Transfer of causes

   "(c) * * * . If all the justices should disqualify in a case, then the Chief Justice shall request that the Governor appoint qualified members of the bar to sit in the case as special justices, all as provided in 20 O.S. 1971, § 1402."

7. Okla. Stat. Tit. 20 § 1402 (West 1991) in part, states:

   § 1402. Disqualification of appellate judges

   " * * * ; and the same qualifications shall apply to the members of the Supreme Court and the Criminal Court of Appeals, as to other courts of record, and whenever any member of either of said Courts is disqualified the same shall be entered of record in such Court and such disqualifications of such member shall forthwith be certified by the Clerk of such Court to the Governor of the state, who shall appoint some member of the Bar of the state, possessing the same qualifications as the members of such Court, to sit as special Judge in said cause."

8. Okla. Stat. Tit 73 §§ 168.3 and 301 (West Supp. 1998). The complete text of these bond issue statutes are set forth at Appendix B at App. 20 and 23.

STATEMENT OF THE CASE

The petitioners Jerry R. Fent and Margaret B. Fent herein were also the petitioners in the Supreme Court of the State of Oklahoma and may also be referred to as FENTS.

The respondents Oklahoma Capitol Improvement Authority (a State authority) herein were also the respondents in the Supreme Court of the State of Oklahoma and may also be referred to as OCIA or STATE.

A. Factual Background

This case is a continuing dispute over the validity of OCIA debt bonds that are structured in such a form that the right to vote on future debt is now denied the people of Oklahoma.

In a prior bond issue, the Oklahoma legislature and governor approved an authorization for a 300 million dollar bond issue for numerous "free road" improvements in about all the legislative districts in Oklahoma and thus having all the elements of a "pork barrel" bill.

The problem with the bill was the bonds were to be paid off by yearly general legislative appropriations giving all the appearance of a general obligation (GO Bonds) bond issue that by the Oklahoma Constitution requires a vote of the people for the State to incur debt beyond one fiscal year.

In a bitter five to four opinion, the Oklahoma Supreme Court, sitting in original trial jurisdiction, approved these OCIA bonds that were being promoted by the legislature and governor.

The FENTS were a party to this first case as published in *Application of Oklahoma Capitol Improvement Authority*, 1998 OK 25, 958 P.2d 759, cert. denied, (*'Fent v. Oklahoma Captiol Improvement Authority'*), 119 S.Ct. 174, 142 L.Ed.2d 142 (1998), hereafter called FENT I.

The Oklahoma court approved a hybrid offspring of the general obligation bond ('GO Bond') issue by the creation of a moral obligation bond ('MO Bond') issue. Both types of bonds have the same essential elements with the GO Bond's payments guaranteed by the "full faith and credit" of the legislative appropriations and the MO Bond's legislative appropriations guaranteed by insurance purchased by the State. See the table in this petition at page 19 showing these "separate but equal bond issues".

Immediately after the U.S. Supreme Court denied a petition for a writ of certiorari in the FENT I case, the Oklahoma legislature and governor apparently realized that this new "moral obligation bond" method could bring in millions of revenue for these politicians to get credit for in new capitol improvements (getting reelected?) and maybe not being around to pay the debts off.

On May 29, 1998, the Oklahoma legislature and governor approved Oklahoma Enrolled House Bills No. 3065 and 3066 that authorized a new 300 million dollars in debt bonds to be issued by the OCIA **that included 42 million dollars to establish and construct a new exclusive Oklahoma Supreme Court Building**. See App. 23, n.6A(2) and 6A(3). This new bond issue is to be funded similar to the other "moral obligation" method pursuant to Okla. Stat. Tit. 73 §§ 168.3 and 301 (West Supp. 1998).

The time sequence of these two bond issues gives the impression of the old saying, "you scratch my back and I'll scratch yours". It appears that the "old-boy politics" continue to exist in Oklahoma.

B. Proceedings Below

On December 29, 1998, the Petitioners, Jerry R. Fent and Margaret B. Fent ('FENTS') as resident taxpayers and voters of the State of Oklahoma filed an original jurisdiction action contesting this new bond issue (hereinafter 'FENT II' action). The Oklahoma Supreme Court acts as a trial court in hearing State bond issue contest matters.

The FENTS alleged in their application that:

> (a) All nine judges of the Oklahoma Supreme Court should recuse themselves because they are interested parties and should not set in judgment of the validity of the creation of a 42 million dollar bond issue for a new Supreme Court Building. Said recusal is required by the Fifth and Fourteenth Amendments to the U.S. Constitution.
>
> (b) A method of selection for the substitute judges must be determined because the governor who selects substitute judges has a "conflict of interest" in that he is a party to the lawsuit by being Chairman of the OCIA. The "rule of necessity" requiring biased judges to continue to hear the case is a violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. The "rule of necessity" makes a litigant "stuck" with a biased judge. Because of the governor's conflict, the FENTS do not have equal access to substitute judges as given all other litigants in Oklahoma; and
>
> (c) Where the people have a right to vote on "general obligation" debt bonds, pursuant to Oklahoma Constitution, Article 10, §§ 23, 24 and 25, the creation of a separate but equal "moral obligation" debt bonds that deny the people's

right to vote upon said debt is a violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

On April 20, 1999, all of the Oklahoma Supreme Court denied their own recusal. On June 28, 1999, the Oklahoma Supreme Court approved the bond issue by a six to three opinion that gave validity to a bond issue which included 42 million dollars for a new Oklahoma Supreme Court Building. On July 13, 1999, the Oklahoma Supreme Court denied the Fents' petition for rehearing.

REASONS FOR GRANTING THE WRIT

PROPOSITION I

THE OKLAHOMA SUPREME COURT WHILE SITTING IN JUDGMENT OF THE VALIDITY OF ITS OWN 42 MILLION DOLLAR BOND ISSUE FOLLOWED A FEDERAL CONSTITUTIONAL STANDARD OF REVIEW FOR RECUSAL AND DISQUALIFICATION OF JUDGES AS ANNOUNCED IN *COM. OF NORTHERN MARIANA ISLANDS V. KAIPAT*, 94 F.3d 574 (9th Cir. 1996) IN LIEU OF THE DUE PROCESS STANDARD OF "POSSIBLE TEMPTATION" HELD BY THIS COURT.

Pursuant to U.S. Sup. Ct. Rule 10(c) this State court has decided an important federal constitutional question on due process as to a party having a right to an impartial court in a way that conflicts with the relevant decisions of this Court in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) and *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) cases. The U.S.

Supreme Court used the "possible temptation" principle in these cases and said test continues to this date.

The Oklahoma Supreme Court was sitting in judgment as to the creation and validity of their own 42 million dollar bond issue for a new Supreme Court Building. This raises a question of "possible temptation" to a degree that interferes with due process of a fair trial and impartial judges.

Participation by a neutral, noninterested and detached decisionmaker is one of several essential elements of procedural due process applied to a court.

The neutral examiner concept is deeply engrained in Anglo-American jurisprudence. It came into the fabric of our fundamental law long before the Warren Court era and has been consistently enforced *sans* aberrational departure.

The *Tumey*, supra, case arose out of a conviction in a mayor's court for violation of state prohibition laws. In addition to his regular income, the mayor-judge shared in the fees and costs levied against convicted violators. The Court held that due process is violated when a decision is made by "a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against" the defendant.

The *Ward*, supra, case dealt with traffic convictions in a mayor's court. The mayor-judge was responsible for village finances; and the mayor's court, through fines, forfeitures, costs and fees, supplied a major part of the village's revenue. The system was challenged because it denied the defendant a trial before a disinterested and

impartial judicial officer, contrary to the guarantee of due process.

Later, in *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973) this court said:

> "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. *Tumey v. Ohio* [*supra*]. . . . And *Ward v. Village of Monroeville* [*supra*], indicates that the financial stake need not be as direct or positive as it appeared to be in *Tumey*".

The bond issue ruled upon by the Oklahoma Supreme Court contains 32 million dollars for the Oklahoma Historical Society to move from its Wiley Post Historical Building into a newly constructed Oklahoma Historical Building. The Oklahoma Supreme Court has a direct legal interest in these bonds in that the Oklahoma Historical Society must move out of the Wiley Post Historical Building *before* the Oklahoma Supreme Court can move into the same building and thus have its own exclusive Oklahoma Supreme Court Building. See Appendix at App. 23 n.6A(2).

The bond issue ruled upon by the Oklahoma Supreme Court contains 10 million dollars for the Oklahoma Supreme Court to move over into the old Wiley Post Historical Building and remodel it into an exclusive Oklahoma Supreme Court Building. The Oklahoma Supreme Court has a direct legal interest in this 10 million dollars for itself to have new expanded offices in its own building. See Appendix at App. 23 n.6A(3).

The Oklahoma Supreme Court cited and used the case of *Com. of Northern Mariana Islands v. Kaipat,* 94 F.3d 574 (9th Cir. 1996) as its **federal constitutional standard** to determine whether the court should recuse and disqualify itself in this case. See Appendix at App. 1. The Ninth Circuit used a "strong official motive stemming from an interest apart from his judicial functions "test. *Kaipat,* at 582.

In addition to the wrong test, the *Kaipat* case can be distinguished from our case at argument. The *Kaipat* issue was the judge's interest in cases coming before him as to the use of fines as a **partial funding** of an **existing** court fund.

This FENT II case is the "possible temptation" in **approval of the creation and validity** of a bond issue that will fund a new Oklahoma Supreme Court Building.

This court should resolve this conflict and correct this injustice.

PROPOSITION II

THE USE OF THE "RULE OF NECESSITY" TO DENY IMPARTIAL JUDGES FOR THESE PETITIONERS IS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF LAW WHERE THESE PARTIES ARE STUCK WITH BIASED JUDGES AND WHERE OTHER PARTIES ARE PERMITTED SUBSTITUTE JUDGES; AND THIS CREATES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

Pursuant to U.S. Sup. Ct. Rule 10(c) this State court has decided an important federal constitutional question

on procedural due process of the equal protection clause that has not been, but should be settled by this court in that under these statutes all other parties would get substitute judges but these petitioners would not.

The Oklahoma Supreme Court's April 20, 1999 decision denying disqualification of all the judges discussed the "rule of necessity" as the reason one or all cannot disqualify themselves. See Appendix at App. 3 et seq.

If the law – either state or federal – were bereft of mechanism for replacing a disqualified judge, a "rule of necessity" would permit the challenged biased judge to continue to sit in the case.

Therefore, a litigant is "stuck" with biased judges. Is this due process? We think not.

The "rule of necessity" was applied in this case. What is the "rule of necessity?" Black's Law Dictionary, 6th Ed., Page 1332, defines "Rule of Necessity" as:

> "**Rule of necessity**. While a judge should disqualify himself when called upon to decide a matter in which he has a direct interest, if he is the only judge with power to hear and determine the matter, the rule of necessity requires that he hear it. Evans v. Gore, 253 U.S. 245, 40 S.Ct. 550 64 L.Ed., 887."

The Oklahoma statutory procedure upon recusal of *all* the justices, is that it is the duty of the Governor to appoint qualified members of the state bar to fill the vacant seats as "special judges".

However, the Governor has a "conflict of interest" in this case in that the Governor is also the Chairman of the

OCIA and therefore a litigant in the case. A litigant should not appoint his own judges in a case.

Okla. State. Tit. 20, App. 20, Rule 9(c) (West 1991) in part, states:

> **Rule 9. Disqualification of judge – Assignment of successor – Transfer of causes**
> "(c) * * * . If all the justices should disqualify in a case, then the Chief Justice shall request that the Governor appoint qualified members of the bar to sit in the case as special justices, all as provided in 20 O.S. 1971, § 1402."

And, Okla. Stat. Tit. 20 § 1402 (West 1991) in part, states:

> **§ 1402. Disqualification of appellate judges**
>
> " * * * ; and the same qualifications shall apply to the members of the Supreme Court and the Criminal Court of Appeals, as to other courts of record, and whenever any member of either of said Courts is disqualified the same shall be entered of record in such Court and such disqualifications of such member shall forthwith be certified by the Clerk of such Court to the Governor of the state, who shall appoint some member of the Bar of the state, possessing the same qualifications as the members of such Court, to sit as special Judge in said cause."

The summary of Justice Opala and Kauger concurring opinion states:

> "¶ 13 It is my firm view that I do have a stake in the outcome of this case and am hence subject to the petitioner's quest for disqualification.

> *Recusal of all justices would precipitate the Governor's appointment of pro tempore justices to hear the Chief Executive's own cause.* My recusal would allow the Chief Justice to choose my replacement. He, like the Governor, would be disqualified to select my successor. By the law's clear command of the rule of necessity, *all the justices* must decline to relinquish their seats and be available to decide whether the bonds should be approved or the challenge to their validity sustained." Appendix at App. 11.

And Justice Simms, Kauger and Watt concurring opinion states:

> "¶ 4 * * * . I agree with my brother Opala, that if, arguendo, this Court were disqualified, the Rule of Necessity would come into focus. Certainly, the Governor could not name the court in a case in which he is a litigant. There is no other statutory or constitutional authority existing by which any substitute tribunal could be named.
>
> ¶ 5 I am authorized to state that Justice Kauger and Justice Watt join with the views expressed herein." Appendix at App. 12.

A post-recusal replacement mechanism for the Oklahoma Supreme Court judges must exist and also be the same for these parties.

The command for procedural uniformity comes from the federal fundamental law of due process and equal protection of law.

The Oklahoma statutes do not give a due process procedure for selection of substitute judges where the Governor (as the selector) has a conflict of interest by being a litigant. All other litigants would get impartial

judges when the Governor has no conflict by being a litigant.

When state court procedures provided for a change of venue for felony trials but not for misdemeanor trials, this court held in *Groppi v. Wisconsin*, 400 U.S. 509, 91 S.Ct. 490, 27 L.Ed.2d 571 (1971) and *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) that the state laws were unconstitutional and must yield to the U.S. Constitutional requirements of due process and equal protection of law for allowing all its citizens a change of venue procedure in court.

The *Groppi*, supra, case teaches that conformity to constitutional procedure is compellable even when there is a lack of authorizing provisions in state law.

Therefore, these petitioners are "stuck" with biased or interested judges because no Oklahoma statutory procedure exists for FENTS for the selection of "special judges". All other parties are allowed "special substitute judges" by Oklahoma's statutes.

This court should resolve this question of an absence of a court procedure for some of its citizens while others have access to such a procedure.

PROPOSITION III

THE ESTABLISHING OF A SEPARATE BUT EQUAL FORM OF DEBT BONDS FOR THE DENIAL OF THE PEOPLE'S RIGHT TO VOTE IS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF LAW AND CREATES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

Pursuant to U.S. Sup. Ct. Rule 10(c) this State court has decided an important federal constitutional question on due process of the equal protection clause that has not been, but should be settled by this court in that where the state allows the voting right for General Obligation ("GO") Bonds but not on a separate but equal form of Moral Obligation ("MO") Bonds.

The Oklahoma court has held that a separate debt form does not deny the people the right to vote upon debt issues.

The U.S. Supreme Court has previously accepted Federal jurisdiction in prior cases questioning the validity of State Constitutions and statutes limiting voting rights of taxpayers on State bond issues in the cases of *City v. Phoenix v. Kolodziejski*, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970) (exclusion of all non-property – owning State voters from elections pursuant to Arizona Constitution on State general obligation bonds was unconstitutional) and *Hill v. Stone*, 421 U.S. 289, 297, 95 S.Ct. 1637, 1643, 44 L.Ed.2d 172 (1975) (the Court found invalid state laws tying voting eligibility to property ownership in elections to approve issuance of bonds to finance a city library).

The U.S. Supreme Court has used the federal standard of "equal protection of laws" to prohibit discrimination or exclude members of the general voting class from voting on bond issues.

A "separate but equal" federal doctrine was approved in *Plessy v. Ferguson*, 162 U.S. 537, 41 L.Ed. 256, 16 S.Ct. 1138 (1806) requiring whites and colored people separate railway cars for travel. This "separate but equal" federal doctrine was overruled in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954) in the field of public education as a violation of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

This U.S. Court accepted jurisdiction of the *Brown* case and made its equal protection ruling even though "education" is not a fundamental right protected by the U.S. Constitution. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-37, 93 S.Ct. 1278, 1296-99, 36 L.Ed.2d 16 (1973) (education is not a federally protected fundamental right).

The U.S. Supreme Court has acknowledged that the right to vote is a fundamental right, see *Harper v. Virginia Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (denial of the right to vote based upon a State poll tax).

The taxpayers of the State of Oklahoma right to vote on State "debt" questions is reserved in Oklahoma's Constitution, Art. 10, §§ 23, 24 and 25.

The Constitution of Oklahoma, Article 10, Section 23 provides that the "state shall never create or authorize

the creation of any debt or obligation * * * , *regardless of its form* * * * ." (Emphasis supplied).

The Oklahoma court used the "reasonable basis" standard of review to justify the validity of the legislature's Okla. Stat. Tit. 73 §§ 168.3 and 301 (West Supp. 1998) bond issues and the denial of voting. See Appendix at App. 17 et seq.

This Court employs a piercing "strict scrutiny" where the challenged law operates to interfere with the exercise of a "fundamental" right. The Court accords the distinction of no presumption of constitutionality in these cases.

If the right is one deemed to be constitutionally fundamental, then strict judicial scrutiny is required. *Harper*, supra, (right to vote is fundamental).

Where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized. See *Reynolds v. Sims*, 377 U.S. 533, 561-562, 12 L.Ed.2d 506, 527, 84 S.Ct. 1362 (1964) (voting).

If a statute is subject to strict scrutiny, the **statute always or nearly always is struck down**. *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

Under this strict scrutiny approach, the Court has erected a **virtual per se rule of invalidity**. *City of Philadelphia v. New Jersey* (1978) 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475.

The U.S. Supreme Court has noted reason to take action in "an absolute denial of the franchise." See *Kramer v. Union Free School District*, 395 U.S. 621, 626 n.6, 89 S.Ct.

1886, 1889 n.6 (1969) (denial of State voters in a State election).

This court should grant a writ of certiorari to answer this important federal question as to whether the separate but equal form of debt can be used to deny the people's fundamentally protected right to vote.

See the table below for a comparison of the ten equal elements of the moral obligation bond form designed to deny the people's right to vote on state debt where the people's right to vote on state debt general obligation bonds exists.

TABLE OF
SEPARATE BUT EQUAL DEBT FORM
FOR THE DENIAL OF THE RIGHT TO VOTE

G.O. STATE BOND ISSUE (GENERAL OBLIGATION) STATE ALLOWS VOTING	OCIA STATE BOND ISSUE (MORAL OBLIGATION) STATE DENIES VOTING
1. $300,000,000	1. SAME
2. 20 year bond issue.	2. SAME
3. Bond forms used.	3. SAME
4. Principal and interest paid each year.	4. SAME
5. Debt or obligation authorized by State legislature.	5. SAME
6. Debt or obligation payable by State or State agency.	6. SAME

[Table Continued]

7. Paid by general appropriations of the State legislature.	7. SAME
8. Paid off by public tax dollars.	8. SAME
9. No facilities or improvements for bond holders to go against or foreclose.	9. SAME
10. State's full faith and credit is guaranteed for the payment of the 20 year bonds.	10. State purchases insurance as a guarantee for the payment of the 20 year bonds.

CONCLUSION

When the Oklahoma Supreme Court acted as an original trial court jurisdiction our only appeal and review is with this court.

The issues of this case are current with the legal, social and political issues of ethics and morals of today.

We pray that this Court, upon consideration of the argument above, grant the petition for a writ of certiorari for a review of the important issues raised herein.

Respectfully submitted,

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Attorney for Petitioners

**Counsel of Record*

APPENDIX A

1999 OK 64

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

JERRY R. FENT and MARGARET B. FENT, husband and wife, as resident taxpayers and voters of the State of Oklahoma,	)	No. 92,390
Petitioners,	)	(Filed April 20, 1999)
v.	)	
OKLAHOMA CAPITOL IMPROVEMENT AUTHORITY, a body corporate and politic of the STATE OF OKLAHOMA,	)	
Respondent.	)	

ORDER

¶ 1 Original jurisdiction is assumed as to the issue of disqualification of all of the Justices of the Oklahoma Supreme Court, with other merit issues to be subsequently considered. The interest of the individual Justices in a Capitol Improvement Bond Issue, including bonds for new judicial facilities, is too speculative and insubstantial to constitute an interest in the outcome of this cause, involving the legality of that bond issue, to require disqualification of any or all of the Justices. *Commonwealth of Northern Mariana Islands v. Kaipat*, CC 9th, 94 F.3d 574 (1996).

¶ 2 DONE BY THE ORDER OF THE SUPREME COURT IN CONFERENCE THIS 19th DAY OF April, 1999.

/s/ R. Hargrave
VICE CHIEF JUSTICE

¶ 3 SUMMERS, C.J., HARGRAVE, V.C.J., HODGES, LAVENDER, SIMMS, WILSON, KAUGER and WATT, JJ. – concur

¶ 4 OPALA, J. – Concurs in result

OK 1999 64

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

JERRY R. FENT and MARGARET B. FENT, husband and wife, as resident taxpayers and voters of the State of Oklahoma,	)	No. 92,390
Petitioners,	)	(Filed April 20, 1999)
v.	)	
OKLAHOMA CAPITOL IMPROVEMENT AUTHORITY, a body corporate and politic of the STATE OF OKLAHOMA,	)	
Respondent.	)	

OPALA, J., with whom KAUGER, J., joins only insofar as the rule of necessity is invoked in Parts III and IV, concurring in result.

¶ 1 Challenged is the validity of bonds to be issued. Some of these will be used for renovation of the State Historical Building slated for occupation by the Supreme Court. Petitioners move that all the justices disqualify because they will benefit from having new quarters. I conclude that, although subject to recusal, the court's justices must nonetheless decline to step down by invoking the rule of necessity.

I

THE U.S. CONSTITUTION COMMANDS A NEUTRAL AND DETACHED JUDICIARY

¶ 2 Ever since *Tumey v. Ohio*,[1] a tribunal's *impartiality* has been a *sine qua non* element of due process within the meaning of the Fifth and Fourteenth Amendments.[2] Judges must be not only *neutral* but also *detached*. These prerequisites preserve both the reality and appearance of fairness.[3] Lack of financial interest in the outcome of a case is *not the sole indication* of a court's fitness. Judges must also be free from an intellectual or emotional commitment that would indicate *a predilection* for or against a given resolution of the controversy at hand.[4]

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[1] *See* Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927).

[2] Chief Justice Taft, relying on the common law of England, recognized as a fundamental principle of due process that judicial officers be disqualified by their interest in a controversy to be decided. *See id.*, 273 U.S. at 522-23, 47 S.Ct. at 441 (citing Dimes v. Grand Junction Canal, [111] H.L.C. 759); *see also* Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for So. Cal., 508 U.S. 602, 617, 113 S.Ct. 2264, 2277, 124 L.Ed.2d 539 (1993); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822, 106 S.Ct. 1580, 1585, 89 L.Ed.2d 823 (1986); Ward v. Village of Monroeville, 409 U.S. 57, 61-62, 93 S.Ct. 80, 84, 34 L.Ed.2d 267 (1972); Bartkus v. People of Illinois, 359 U.S. 121, 128, 79 S.Ct. 676, 680, 3 L.Ed.2d 684 (1959).

[3] *See* Marshall v. Jerrico, Inc. 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182; *see also* Ward v. Village of Monroeville, 409 U.S. 57, 61-62, 93 S.Ct. 80, 84, 34 L.Ed.2d 267 (1972).

[4] *See* Karl Georg Wurzel, *Methods of Juridical Thinking* in WILLIAM R. BISHIN & CHRISTOPHER D. STONE, LAW, LANGUAGE & ETHICS 883-84 (University Casebook Series, 1972).

II

DISPASSIONATENESS IS AN INDISPENSABLE PREREQUISITE FOR A DETACHED PROCESS OF ADJUDICATION

¶ 3 If one's *economic interest were the sole test of a judge's neutrality and detachment,* I would accede to the court's characterization of the justices' interest in this case as, at best, *de minimis,* speculative, and remote. What the analysis in today's order plainly disregards is that a tribunal's *dispassionateness* constitutes a *sine qua non* component of the fundamental law's standard of fairness in adjudication.[5] In order to administer judicial process without the taint of prejudice,[6] a judge must "think dispassionately and submerge private feeling on every aspect of a case."[7]

¶ 4 The U.S. Constitution's due process gauge of impartiality for a tribunal's adjudicative fitness is encapsulated in the eloquence of the text that follows:

> But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the

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[5] *See* Wurzel, *supra* note 4.

[6] *See* OKLA. CONST. Art. 2, § 6 which provides that "justice shall be administered without . . . prejudice."

[7] Public Utilities Commission v. Pollak, 343 U.S. 451, 466, 72 S.Ct. 813, 822, 96 L.Ed. 1068 (1952) (Frankfurter, J., expressly taking no part in the decision).

> average man as a judge * * * not to hold the balance nice, clear, and true . . . denies the latter due process of law.' *Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'*[8]

¶ 5 No less rigid is the standard-of-fairness test required for judicial officers by the commands of Article 2, section 6 of the Oklahoma Constitution:[9]

> Every litigant is entitled to nothing less than the cold neutrality of an impartial judge.[10]

> It is the duty of courts to scrupulously guard our constitutional rights to a speedy trial without prejudice, *and a judge should refrain from trying to exercise jurisdiction in any matter where his qualification to so do is seriously brought in question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.*[11]

¶ 6 The justices have not been challenged in this case for having a personal *financial* interest in the approval of the proposed bonds. The court admittedly has no known identification with, or involvement in, the business

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[8] In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) (citing Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927) and Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954)) (emphasis supplied and citations omitted).

[9] See *supra* note 6 for the pertinent provisions.

[10] State v. Sullivan, 207 Okl. 128, 248 P.2d 239, 244 (1952).

[11] *Id.* (emphasis supplied).

aspects of the transaction to be approved. Rather, the interposed challenge is to each of the individual justice's detachment. It is rested on our *lack of dispassionateness* alleged to stem from the court's stake in its opportunity to benefit from *upgraded* judicial facilities.

¶ 7 I *cannot deem myself dispassionate* when the outcome of the case affects my cherished status symbol – the chambers in which my work is performed. Accommodations are a very important part of one's status in society. In contemporary American culture a private bathroom in one's executive suite of elegantly appointed offices is a symbol as well as a mark of achievement on the corporate ladder. I will not deny that this corporate culture has permeated the walls and corridors of the judiciary. In short, I cannot ignore my "stake" in the outcome of this case. To do otherwise would be to throw candor to the winds and to *counteroffer a mere pretense* that the lure of elegantly appointed chambers, each with a private bathroom, counts for absolutely nothing when weighed against my self-advanced profession of virginal detachment.[12]

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[12] *See id.*, where it is stated:

> To force the petitioner to trial in face of the fear that the suggestions for disqualification warrant[s] would be to impose on him a condition contrary to every principle devised for the administration of justice under our jurisprudence. *There may in reality be little basis for his fear but if it's there, the renunciation of the trial judge won't efface it.*

(emphasis supplied).

¶ 8 The prospect of a sure gain, however much misperceived as something that is one's due, will invite a preference in any set of competing alternatives. This behavioral pattern is driven by human instinct. To proclaim its eradication by a professionally cultivated taste for (or habit of) voluntary suppression, or to rest the case against recusal on a categorical self-denial, will not bring honor to, or respect for, those who are in the service of judging. Public confidence in judicial impartiality has to be anchored in a faith-inspiring pedestal of much greater solidity. Not even the mighty pen of my colleague writing today in unqualified support for the court's order can convincingly repeal man's nature by his *ipse dixit*.

III

EN BANC RECUSAL OF THE JUSTICES WOULD OPEN THE DOOR FOR A GUBERNATORIAL APPOINTMENT OF SUCCESSORS

¶ 9 If a justice of the Oklahoma Supreme Court disqualifies from participation in a case, the Chief Justice assigns a state judicial officer to act in the place of the recused incumbent.[13] *Upon recusal of all the justices*, it is the duty of the Governor to appoint qualified members of the state bar to fill the vacant seats as "special justices".[14]

¶ 10 All of the justices have been challenged here for the same reason. Upon their recusal the Governor, though a

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[13] *See* 20 O.S.1991 Ch. 1, App. 2, Rule 9(b); OKLA. CONST. Art. 7, §§ 6, 8(i).

[14] *See* 20 O.S.1991 Ch. 1, App. 2, Rule 9(c); 20 O.S.1991 § 1402.

litigant[15] in this cause, would have statutory authority to exercise his power of appointment. The persons so appointed are likely to be challenged as having received title from one who was not fit to confer it. Although the Governor does not necessarily have to be neutral, we cannot allow the judicial process to sink below its constitutional minimum *by inviting the Chief Executive to, in effect, select his own court. It is a venerable common law adage that no litigant can appoint his own judges.*[16]

IV

THE RULE OF NECESSITY COMMANDS THAT THE JUSTICES NOT RELINQUISH THEIR POSTS

¶ 11 The "rule of necessity," a well-established common-law principle, requires a judge to remain in a case, regardless of the judge's interest in the outcome, if

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[15] ***The Governor, as the Chairman of the Oklahoma Capitol Improvement Authority, is a litigant in this case.***

[16] *Nemo Potest Esse Simul Actor et Judex.* No one can be at once a suitor and a judge. Broom, Max. 117. *Nemo Agit in Seipsum.* A man cannot be a judge and a party in the same case. Broom, Max. 216n. *Nemo debet esse judex in propia causa.* No man ought to be a judge in his own cause. *See* BLACK'S LAW DICTIONARY 935, 936 (5th ed. 1979). Lord Campbell recognized that "it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies [also] to a cause in which he has an interest." Dimes v. Grand Junction Canal, 111 H.L.C. 759, 793 (1852).

the sole power to decide the controversy resides in him.[17] Where, as here, there exists no constitutionally *credible* provision for post-recusal filling of vacant seats, the justices have a *duty* to decide the controversy notwithstanding their imputed lack of impartiality.[18]

¶ 12 The rule of necessity governs this case not because there is no replacement mechanism but because the exercise of that mechanism,[19] controlled by one who is a party to the lawsuit, would be clouded by grave fundamental-law infirmity. Even if the Governor were to defeat a challenge to his appointment power, the law could not sanction his functioning *in this case* in a dual capacity – as both litigant and judge.[20] The appointment power of the Chief Justice[21] would likewise be tainted as all justices are challenged as having the same interest in the litigation. We must hence remain on the bench to prevent that vacuum which would be filled by persons with a constitutionally clouded status.

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[17] *See* United States v. Will, 449 U.S. 200, 213, 101 S.Ct. 471, 480, 66 L.Ed.2d 392 (1980); Southwestern Bell Telephone Co. v. Oklahoma Corp. Comm'n, 1994 OK 38, ¶ 24 n.87, 873 P.2d 1001, 1023 n. 87 (1994) (Opala, J., dissenting).

[18] *See Will*, 449 U.S. at 214, 101 S.Ct. at 480.

[19] *See supra* note 14.

[20] *See supra* note 15.

[21] *See supra* note 13.

V

SUMMARY

¶ 13 It is my firm view that I do have a stake in the outcome of this case and am hence subject to the petitioner's quest for disqualification. *Recusal of all justices would precipitate the Governor's appointment of pro tempore justices to hear the Chief Executive's own cause.* My recusal would allow the Chief Justice to choose my replacement. He, like the Governor, would be disqualified to select my successor. By the law's clear command of the rule of necessity, *all the justices* must decline to relinquish their seats and be available to decide whether the bonds should be approved or the challenge to their validity sustained.

SIMMS, J., CONCURRING:

¶ 1 I most respectfully disagree with my colleague, Justice Opala, when he opines that each and every Justice on this Court is disqualified in this bond case simply because of the potential for improved chambers if and when these bonds are marketed, and the funds from the bond sale for a new and improved courts building become an actuality. I dare say my colleague speaks only for himself and not for the other members of this Court in his thoughts about the desirability and importance of a private bathroom. The grounds for disqualification urged by Justice Opala are more imagined than real, for it is my observation that Justice Opala is the only member of this

Court who is passionate about having a bathroom in his chambers.

¶ 2 There is nothing new or novel about a judge or justice having private bathroom facilities. Indeed, when the Tulsa County Courthouse was dedicated in about 1954, that courthouse was designed with private bathroom facilities for each judge's chambers. A visit to many of the older courthouses in Oklahoma will reveal the judge has access to private facilities.

¶ 3 This Justice, due to the passage of time between planning and occupancy of a new court building, will never occupy the new or remodeled building, and therefore has no thoughts of sugar plums dancing in his head. Even casual study of the current court shows this observation applies to other Justices as well.

¶ 4 Although I do not believe Fent has established any ground for the disqualification of any of the Justices or any Justice of this Court, I agree with my brother Opala, that if, arguendo, this Court were disqualified, the Rule of Necessity would come into focus. Certainly, the Governor could not name the court in a case in which he is a litigant. There is no other statutory or constitutional authority existing by which any substitute tribunal could be named.

¶ 5 I am authorized to state that Justice Kauger and Justice Watt join with the views expressed herein

APPENDIX B

1999 OK 64

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

JERRY R. FENT and MARGARET B. FENT, husband and wife, as resident taxpayers and voters of the State of Oklahoma,

Petitioners,

v.

OKLAHOMA CAPITAL IMPROVEMENT AUTHORITY, a body corporate and politic of the STATE OF OKLAHOMA

Respondent.

No. 92,390

For Official Publication

(Filed June 28, 1999)

ACTION TO ASSUME ORIGINAL JURISDICTION AND TO DETERMINE STATUTES AND BONDS UNCONSTITUTIONAL

¶ 0 Petitioners, two taxpayers, brought an original proceeding challenging the constitutionality of 73 O.S. Supp. 1998, §§ 168.3 and 301, two statutes authorizing respondent, the Oklahoma Capitol Improvement Authority (OCIA), to issue over $300 million dollars in bonds to fund various governmental projects. Petitioners seek disapproval of any bonds issued under the statutes, primarily based on the argument the bonds would create prohibited debt in violation of OKLA. CONST. art. 10, §§ 23 and 25 (balanced budget provisions) without a vote of the State's citizens. Petitioners also assert the statutes

were passed in violation of one or more of the strictures of OKLA. CONST. art. 5, § 33, which requires revenue bills to originate in the State House of Representatives, that no such bill be passed in the last five days of a legislative session and that such bills must garner a 75% super-majority vote in both the State House and Senate to avoid being submitted to a vote of the people. OCIA counters that neither statute authorizes prohibited debt, neither is a revenue measure controlled by § 33, and OCIA seeks approval of two proposed bond issues in the approximate amount of $165 million dollars. **Held**: Petitioners have not shown either § 168.3 or § 301 are unconstitutional. Neither authorizes debt in the constitutional sense because both statutes only allow the issuance and sale of what are known as appropriation-risk or moral obligation bonds. Oklahoma constitutional balanced budget provisions are, thus, inapplicable. Further, §§ 168.3 and 301 are not revenue bills controlled by OKLA. CONST. art. 5, § 33 because their principal object is not the raising of revenue, but to provide adequate facilities and/or equipment for State agencies, departments and/or instrumentalities and no taxes are levied or authorized to be levied by either statute.

ORIGINAL JURISDICTION ASSUMED; STATUTES AND BOND PROPOSAL ISSUES HELD CONSTITUTIONAL.

Russell B. Fister, Oklahoma City, Oklahoma for Petitioner.

Douglas F. Price, Assistant Attorney General, Oklahoma City, Oklahoma; Thomas J. Hilborne, Jr. of Hilborne & Weidman, Tulsa, Oklahoma; and Gary M. Bush of Fagin,

Brown, Bush, Tinney & Kiser, Oklahoma City, Oklahoma for Respondent.

PER CURIAM:

¶ 1 Under 73 O.S. 1991, § 160, this Court is given exclusive original jurisdiction to determine the validity of bond issues proposed by respondent, Oklahoma Capitol Improvement Authority (OCIA). Petitioners, Jerry R. Fent and Margaret B. Fent (husband and wife), two resident taxpayers and registered voters of Oklahoma (hereafter taxpayers) brought this original proceeding challenging the constitutionality of two statutes, 73 O.S. Supp. 1998, §§ 168.3 and 301, which together authorize OCIA to issue over $300 million dollars in bonds to fund various governmental projects.[1] Taxpayers seek disapproval of any bonds issued under the statutes, primarily based on the

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[1] We note that an individual, Edwin Kessler has filed an entry of appearance in this matter on behalf of himself and an organization named Common Cause Oklahoma of which Mr. Kessler is State Chair. Mr. Kessler also filed a brief in this matter on May 26, 1999, wherein, like Jerry R. Fent and Margaret B. Fent, the two taxpayer petitioners that initiated this proceeding, he sets forth his arguments in opposition to the bond issues involved here, apparently on behalf of himself and the organization. In essence, the arguments of Mr. Kessler are substantially the same as those made by the two taxpayer petitioners. Further, at a hearing held in this matter on May 28, 1999 before a Referee of this Court, an individual by the name of Marjorie Greer, purportedly representing the Norman League of Women Voters, as its co-chair, appeared to protest the proposed bond issues. Ms. Greer has not filed any substantive briefs in this matter. At the May 28th hearing she orally stated her support for the brief filed by Mr. Kessler.

argument the bonds would create prohibited debt in violation of OKLA. CONST. art. 10, §§ 23,[2] 24[3] and 25[4] (balanced budget provisions) without a vote of the State's citizens. They also claim the statutes were passed in violation of one or more of the strictures of OKLA. CONST. art. 5, § 33. Section 33 requires revenue bills to originate in the State House of Representatives, that no

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[2] OKLA. CONST. art. 10, § 23 provides in relevant part:

> The state shall never create or authorize the creation of any debt or obligation, or fund or pay any deficit, against the state, or any department, institution or agency thereof, regardless of its form or the source of money from which it is to be paid, except as may be provided in this section and in Sections 24 and 25 of Article X of the Constitution of the State of Oklahoma.

[3] OKLA. CONST. art. 10, § 24 provides in relevant part:

> In addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection or to defend the State in war. . . .

[4] OKLA. CONST. art. 10, § 25 provides in relevant part:

> Except the debts specified in sections twenty-three and twenty-four of this article, no debts shall be hereafter contracted by or on behalf of this State, unless such debt shall be authorized by law for some work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty-five years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election. . . . .

such bill be passed in the last five days of a legislative session and that such bills must garner a 75% super-majority vote in both the State House and Senate to avoid being submitted to a vote of the people. OCIA asserts neither statute authorizes prohibited debt, that neither is a revenue bill controlled by § 33, and OCIA seeks approval of two proposed bond issues, one in the amount of $10 million dollars and the other in the amount of $155 million dollars.

¶ 2 We hold taxpayers have failed to show either § 168.3 or § 301 are unconstitutional. Neither authorizes debt in the constitutional sense because they only allow for the issuance of what are known as appropriation-risk or moral obligation bonds. Oklahoma constitutional balanced budget provisions are, thus, inapplicable. Further, §§ 168.3 and 301 are not revenue bills controlled by OKLA. CONST. art. 5, § 33 because their principal object is not the raising of revenue, but to provide adequate facilities and/or equipment for State agencies, departments and/or instrumentalities and no taxes are levied or authorized to be levied by either statute. Finally, the two proposed bond issues in the total amount of $165 million dollars sought to be approved by OCIA are valid as authorized by either § 168.3 or § 301.

PART I. STANDARD OF REVIEW.

¶ 3 In considering a statute's constitutionality, courts are guided by well established principles. *Application of Oklahoma Capitol Improvement Authority*, 1960 OK 207, 355 P.2d 1028, 1031. A heavy burden is cast on those challenging a legislative enactment to show its unconstitutionality

and every presumption is to be indulged in favor of the constitutionality of a statute. *Application of Oklahoma Capitol Improvement Authority,* 1998 OK 25, 958 P.2d 759, 763, *cert. denied* 119 S.Ct. 174, 142 L. Ed. 2d 142 (1998). If two possible interpretations of a statute are possible, only one of which would render it unconstitutional, a court is bound to give the statute an interpretation that will render it constitutional, unless constitutional infirmity is shown beyond a reasonable doubt. *Gilbert Central Corp. v. State,* 1986 OK 6, 716 P.2d 654, 658. A court is bound to accept an interpretation that avoids constitutional doubt as to the legality of a legislative enactment. *Id.*

¶ 4 It is also firmly recognized that it is not the place of this Court, or any court, to concern itself with a statute's propriety, desirability, wisdom, or its practicality as a working proposition. *Application of Oklahoma Capitol Improvement Authority, supra,* 355 P.2d at 1031; *Oklahoma Industries Authority v. Barnes,* 1988 OK 98, 769 P.2d 115, 119 (the judiciary cannot challenge the wisdom, need or desirability of any constitutionally valid legislation). Such questions are plainly and definitely established by our fundamental law as functions of the legislative branch of government. *Application of Oklahoma Capitol Improvement Authority, supra,* 355 P.2d at 1031. Respect for the integrity of our tripartite scheme for distribution of governmental powers commands that the judiciary abstain from intrusion into legislative policymaking. *Oklahoma Industries Authority v. Barnes, supra,* 769 P.2d at 119. A court's function, when the constitutionality of a statute is put at issue, is limited to a determination of the validity or invalidity of the legislative provision [*Application of Oklahoma Capitol Improvement Authority, supra,* 355 P.2d at 1031] and a

court's function extends no farther in our system of government.

¶ 5 Furthermore, this Court recognized only last year that unless there is a specific constitutional prohibition, the Legislature has the right and responsibility to declare Oklahoma's fiscal policy. *Application of Oklahoma Capitol Improvement Authority, supra,* 958 P.2d at 763. Simply, in ruling on the constitutional validity of a statute relating to this State's fiscal affairs, we are not allowed to consider whether it is based on sound economic theory or whether it is the best means to achieve the desired result because such matters are for legislative determination. *Id.* With these principles understood, we turn to review the statutes involved here and the two proposed bond issues.

PART II. THE BONDS AUTHORIZED BY §§ 168.3 AND 301 ARE NOT DEBT IN A CONSTITUTIONAL SENSE BECAUSE THEY DO NOT CREATE A LEGAL OBLIGATION TO PAY STATE MONIES BEYOND A CURRENT ANNUAL LEGISLATIVE APPROPRIATION. BECAUSE THE BOND PROPOSALS BEFORE US DO NOT CREATE PROHIBITED CONSTITUTIONAL DEBT, THE BUDGET BALANCING AMENDMENTS OF OKLA.CONST.ART. 10, §§ 23, 24 AND 25 ARE INAPPLICABLE.

¶ 6 Although we have considered all arguments raised by taxpayers in an attempt to show the two statutes involved here and the bonds authorized to be issued thereunder, violate OKLA. CONST. art. 10, §§ 23, 24 and 25, we are convinced neither statute authorizes State debt as contemplated by those constitutional provisions and, therefore, those constitutional balanced budget provisions are

simply inapplicable to the bonds sought to be issued and sold by the OCIA under the grant of authority contained in §§ 168.3 and 301. At most, the statutes authorize only appropriation-risk or moral obligation bonds, and under our previous cases the issuance and sale of such bonds do not create debt in a constitutional sense.

¶ 7 Section 168.3 authorizes OCIA to issue and sell bonds to fund certain building projects at the Oklahoma School of Science and Mathematics.[5] Section 301

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[5] 73 O.S. Supp. 1998, § 168.3 provides in full:

A. The Oklahoma Capitol Improvement Authority may acquire land owned by the Board of Trustees of the Oklahoma School of Science and Mathematics. The Oklahoma Capitol Improvement Authority may provide for the funding, construction and maintenance of a building or buildings for use by the Board of Trustees of the Oklahoma School of Science and Mathematics for the operation of the Oklahoma School of Science and Mathematics, and shall hold title to the facilities until such time as the indebtedness created pursuant to this section shall be retired or defeased. Upon the retirement of the indebtedness created pursuant to this section, the title to the land and improvements thereon shall be transferred from the Oklahoma Capitol Improvement Authority to the Board of Trustees of the Oklahoma School of Science and Mathematics.

B. For the purpose of paying the costs of the project authorized in subsection A of this section, the Authority is authorized to borrow monies on the credit of the income and revenues to be derived from such project and, in anticipation of the collection of such income and revenues, to issue negotiable or competitive bonds not to exceed the sum of Six Million Dollars ($6,000,000.00) as may be necessary

authorizes OCIA to issue and sell bonds to fund various governmental projects, ranging from construction of a

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for such purpose as determined by the Authority. The Oklahoma School of Science and Mathematics may not be moved from the building or buildings constructed pursuant to subsection A of this section until all such indebtedness is retired, and shall be required to lease the building or buildings so constructed subject to receiving an annual appropriation for that purpose. It is the intent of the Legislature to appropriate to the Oklahoma School of Science and Mathematics sufficient monies to make lease payments to the Authority for purposes of retiring the debt created pursuant to this section.

C. The bonds provided for in subsection B of this section shall not be issued until such time as the Board of Trustees of the Oklahoma School of Science and Mathematics has met the matching requirement as provided for in subsection G of this section or until a bank that is chartered in this state notifies the Authority, the Governor, the Speaker of the House of Representatives and the President Pro Tempore of the Senate that there exists an irrevocable restricted letter of credit for outstanding pledges or cash on deposit or a combination of both in the amount of Six Million Dollars ($6,000,000.00) for the purpose specified in subsection A of this section. Such notification must occur no later than July 1, 1998. In the alternative, the Authority may issue such bonds in series of no less than One Million Dollars ($1,000,000.00) each. In order to issue the first series of bonds, a bank, as described above, shall certify to the Authority and the above-referenced officers that there exist irrevocable letters of credit for outstanding pledges or cash on deposit or a combination of both in an amount equal to the amount of each subsequent series. Any irrevocable letter of credit required by this subsection shall be issued by a bank chartered in this state and

new building for the J.D. McCarty Center for Children with Developmental Disabilities to the purchase of

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insured by the Federal Deposit Insurance Corporation to the maximum limit available.

D. The proceeds of any bonds issued pursuant to this section and any other monies expended by the Board of Trustees for construction or improvements shall be expended for facilities, which shall include design fees for each such project. The first phase of any campus construction or improvements shall be limited to student housing, a dining facility, library, physical education and student activity facilities, and security needs including but not limited to fencing.

E. All interest earned on any reserve funds created by such bonds held by the State Treasurer, as collected, shall be paid into the General Revenue Fund.

F. Insofar as they are not in conflict with the provisions of this section, the provisions of Section 151 et seq. of Title 73 of the Oklahoma Statutes shall apply to this section.

G. Except as otherwise provided in this subsection, any private, public or nonstate monies pledged or deposited in accordance with this section for the purpose of construction of the campus of the Oklahoma School of Science and Mathematics shall be matched not to exceed Six Million Dollars ($6,000,000.00) by the state as follows:

State	Nonstate	Year of Contribution
60%	40%	July 1, 1993-June 30, 1995
50%	50%	July 1, 1995-June 30, 1998
40%	60%	July 1, 1998-June 30, 1999

No federal funds shall be used for matching purposes pursuant to this subsection.

We note that the 47th Oklahoma Legislature amended § 168.3 by Senate Bill 172, § 2 (signed by the Governor on June 8,

computer hardware and software for the Oklahoma Department of Central Services.[6]

1999), but not in a way material to our disposition of this matter. Essentially, the amendments increased to eight million five hundred thousand dollars the amount of six million dollars specified in § 168.3(B), (C) and (G), and changed the 40%-60% State/Nonstate matching fund provision for July 1, 1998 to June 30, 1999 found in § 168.3(G) to 50%-50% State/Nonstate for July 1, 1998 to June 30, 2000.

[6] 73 O.S. Supp. 1998, § 301 provides in full:

> A. The Oklahoma Capitol Improvement Authority is authorized to acquire real property, together with improvements located thereon, and personal property, to construct buildings and other improvements to real property and to provide funding for repairs, refurbishments and improvements to real and personal property and for funding for the following capital projects in the following amounts:
>
> 1. Capital projects at institutions of higher education which are part of The Oklahoma State System of Higher Education in a total amount not to exceed Forty-five Million Dollars ($45,000,000.00) with debt retirement payments to be made by the Oklahoma State Regents for Higher Education;
>
> 2. Construction of a History Center for the Oklahoma Historical Society in a total amount not to exceed Thirty-two Million Dollars ($32,000,000.00) with debt retirement payments to be made by the Oklahoma Historical Society;
>
> 3. Renovation of the Wiley Post Historical Building for occupancy by appellate courts in a total amount not to exceed Ten Million Dollars ($10,000,000.00) with debt retirement payments to be made by the Oklahoma Supreme Court;

¶ 8 As we interpret both statutes, OCIA is authorized thereunder to fund the costs of the various projects by

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4. Land acquisition, demolition, landscaping, environmental remediation and other costs associated with the Lincoln Boulevard Renaissance Project in a total amount not to exceed Thirteen Million Eight Hundred Thousand Dollars ($13,800,000.00) with debt retirement payments to be made by the Department of Central Services;

5. Construction of a new building for the J.D. McCarty Center for Children with Developmental Disabilities in a total amount not to exceed Ten Million Three Hundred Thousand Dollars ($10,300,000.00) with debt retirement payments to be made by the J.D. McCarty Center for Children with Developmental Disabilities;

6. Funding for capital costs of a Technology Incubator Program for the University Hospitals Authority in a total amount not to exceed Two Million Dollars ($2,000,000.00) with debt retirement payments to be made by the University Hospitals Authority;

7. Funding for capital costs for the Native American Cultural and Educational Authority of Oklahoma in a total amount not to exceed Five Million Dollars($5,000,000.00) with debt retirement payments to be made by the Native American Cultural and Educational Authority of Oklahoma;

8. Funding for capital costs for systemwide equipment for the Oklahoma Department of Vocational and Technical Education in a total amount not to exceed Five Million Dollars ($5,000,000.00) with debt retirement payments to be made by the Oklahoma Department of Vocational and Technical Education;

borrowing monies on the credit of the income and revenues to be derived from the projects. The money

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9. Capital projects for the Oklahoma School for the Deaf in a total amount not to exceed Six Million Seven Hundred Fifty Thousand Dollars ($6,750,000.00) with debt retirement payments to be made by the State Department of Rehabilitation Services;

10. Capital projects for the Oklahoma School for the Blind in a total amount not to exceed Six Million Seven Hundred Fifty Thousand Dollars ($6,750,000.00) with debt retirement payments to be made by the State Department of Rehabilitation Services;

11. Construction of a new Veterans Center in Lawton, Oklahoma, in a total amount not to exceed Twelve Million Dollars ($12,000,000.00) with debt retirement payments to be made by the Oklahoma Department of Veterans Affairs;

12. Capital costs for financial management information systems in a total amount not to exceed One Million Dollars ($1,000,000.00) with debt retirement payments to be made by the Office of State Finance;

13. Funding for the purchase of computer hardware and software for the Central Purchasing Division of the Department of Central Services in a total amount not to exceed Two Million Dollars ($2,000,000.00) with debt retirement payments to be made by the Department of Central Services;

14. Funding for implementation of the Boll Weevil Eradication Act in a total amount not to exceed Three Million Dollars ($3,000,000.00) with debt retirement payments to be made by the State Department of Agriculture;

borrowed will, of course, come from the issuance and sale of the bonds. In turn, the bonds are to be retired by

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15. Funding for construction and other capital costs at Quartz Mountain Lodge and Arts and Conference Center in a total amount not to exceed Three Million Five Hundred Thousand Dollars ($3,500,000.00) with debt retirement payments to be made by the Oklahoma Tourism and Recreation Department; and

16. Such other capital projects as may be specifically authorized by the Oklahoma Legislature to be funded by the obligations authorized herein.

The Authority may hold title to the real and personal property and improvements until such time as any obligations issued for this purpose are retired or defeated and may lease the real property and improvements to the agencies indicated herein. Upon final redemption or defeasance of the obligations created pursuant to this section, title to the real and personal property and improvements shall be transferred from the Oklahoma Capitol Improvement Authority, to the agencies indicated herein.

B. For the purpose of paying the costs for acquisition and construction of the real property and improvements and personal property and making the repairs, refurbishments, and improvements to real and personal property, and providing funding for the projects authorized in subsection A of this section, and for the purpose authorized in subsection C of this section, the Authority is hereby authorized to borrow monies on the credit of the income and revenues to be derived from the leasing of such real and personal property and improvements and, in anticipation of the collection of such income and revenues, to issue negotiable obligations in a total amount not to exceed

payments made to OCIA by the various agencies, departments and/or instrumentalities using and/or benefitting

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Three Hundred Twenty Million Dollars ($320,000,000.00) whether issued in one or more series. The Department of Central Services is authorized and directed to expend funds from the Capital Improvement Revolving Fund in amounts sufficient to make required payments pursuant to such obligations during the fiscal year ending June 30, 1999. For subsequent fiscal years, it is the intent of the Legislature to appropriate to the indicated state agencies sufficient monies to make rental payments for the purposes of retiring the obligations created pursuant to this section. The costs for acquisition and construction of the real and personal property and improvements and repairs, refurbishments and funding for the projects authorized in subsection A of this section shall not exceed Three Hundred Fifteen Million Dollars ($315,000,000.00).

C. To the extent funds are available from the proceeds of the borrowing authorized by subsection B of this section, the Oklahoma Capitol Improvement Authority shall provide for the payment of professional fees and associated costs related to the projects authorized in subsection A of this section.

D. The Authority may issue obligations in one or more series and in conjunction with other issues of the Authority. The Authority is authorized to hire bond counsel, financial consultants, and such other professionals as it may deem necessary to provide for the efficient sale of the obligations and may utilize a portion of the proceeds of any borrowing to create such reserves as may be deemed necessary and to pay costs associated with the issuance and administration of such obligations.

E. The obligations authorized under this section may be sold at either competitive or negotiated sale,

from the projects under lease or other agreements with OCIA. Although each statute expresses an intent to

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as determined by the Authority, and in such form and at such prices as may be authorized by the Authority. The Authority may enter into agreements with such credit enhancers and liquidity providers as may be determined necessary to efficiently market the obligations. The obligations may mature and have such provisions for redemption as shall be determined by the Authority, but in no event shall the final maturity of such obligations occur later than thirty (30) years from the first principal maturity date.

F. Any interest earnings on funds or accounts created for the purposes of this section may be utilized as partial payment of the annual debt service or for the purposes directed by the Authority.

G. The obligations issued under this section, the transfer thereof and the interest earned on such obligations, including any profit derived from the sale thereof, shall not be subject to taxation of any kind by the State of Oklahoma, or by any county, municipality or political subdivision therein.

H. The Authority may direct the investment of all monies in any funds or accounts created in connection with the offering of the obligations authorized under this section. Such investments shall be made in a manner consistent with the investment guidelines of the State Treasurer. The Authority may place additional restrictions on the investment of such monies if necessary to enhance the marketability of the obligations.

I. It is the intent of the Legislature to authorize specific capital projects in the 1st Session of the 47th Oklahoma Legislature to be funded by the negotiable obligations authorized in this section. Such capital projects shall not exceed One Hundred Fifty-six Million Nine Hundred Thousand Dollars ($156,900,000.00).

appropriate sufficient monies to the various agencies, etc. to make such payments to OCIA for the purpose of retiring the bonds, nowhere in either statute is there a provision obligating a future legislature to do so. In such regard, we find applicable the following statement made only last year by this Court in a case concerning the approval of bonds proposed to be issued by OCIA to fund construction, repair and maintenance of state highways:

> Unquestionably, provisions obligating future legislatures are unconstitutional. However, here, there is simply nothing to bind future legislative bodies to make the anticipated appropriations. Future revenues are not pledged . . . for retirement of the proposed bonds. The present Legislature's intent to appropriate the monies is not a binding commitment on future legislatures to do so.

Application of Oklahoma Capitol Improvement Authority, supra, 958 P.2d at 771.

¶ 9 Further, the two bond resolutions before us each contain a copy of the form of bond to be sold and on the face thereof is contained the following disclaimer:

> This bond is not an indebtedness of the State of Oklahoma, nor shall it be deemed to be an obligation of the State of Oklahoma and neither the faith and credit nor the taxing power of

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The 47th Oklahoma Legislature amended § 301 by Senate Bill 115 (signed by the Governor May 27, 1999) and House Bill 1571, § 39 (signed by the Governor June 10, 1999). The amendments are not material to our disposition.

> the State of Oklahoma or any political subdivision thereof is pledged or may hereafter be pledged to the payment of the principal of or the interest on this Bond or the series of which it forms a part. This Bond is not a general obligation of [OCIA] nor a personal obligation of the members of [OCIA], but it is a limited obligation payable solely from the revenues specifically pledged to its payment.

In substance, the two statutes at issue here, and the bonds which they authorize, are indistinguishable from those held valid by this Court on previous occasions. *See Application of Oklahoma Capitol Improvement Authority,* 1998 OK 25, 958 P.2d 759, *cert. denied* 119 S. Ct. 174, 142 L. Ed. 2d 142 (1998); *Application of Oklahoma Capitol Improvement Authority,* 1966 OK 6, 410 P.2d 46; *Application of Oklahoma Capitol Improvement Authority,* 1960 OK 207, 355 P.2d 1028.

¶ 10 Like our previous cases, all the monies bond holders can expect to recover are actual appropriations made by individual legislative bodies. *Application of Oklahoma Capitol Improvement Authority, supra,* 958 P.2d at 772. "If [OCIA] doesn't have monies to retire the bonds, because legislative appropriations are not made, there is nothing for the bondholder to recover." *Id.* at 775. In other words, should future legislative bodies fail to appropriate sufficient funds to retire the bonds, the risk of default is assumed by the bondholders. At most, only appropriation-risk or moral obligation bonds are involved here, not legally enforceable ones, except to the extent each succeeding legislative body actually appropriates funds for their retirement. Furthermore, there is no legally enforceable contract between this State's Legislature and either OCIA, the various agencies, etc. or the

citizens of Oklahoma to make the anticipated appropriations necessary to retire the bonds. *Id.* at 776. Simply, no debt or obligation as contemplated by OKLA. CONST. art. 10, §§ 23, 24 and 25 is created against the State if money is not appropriated and, thus, those provisions of our fundamental law are not applicable.[7]

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[7] Taxpayer petitioners also argue that the purchase of bond insurance by the Oklahoma Capitol Improvement Authority (OCIA) from a bond insurance company in relation to the bond proposals at issue here would be unconstitutional as violative of our constitutional balanced budget provisions, would be void because no "insurable interest" exists and might constitute a prohibited gift by the State to purchasers of the bonds in violation of OKLA. CONST. art. 10, § 15. Although this Court has not been provided with any bond insurance policy that will be purchased by OCIA in relation to the two bond proposals involved here, both of the OCIA bond proposal resolutions adopted on December 18, 1998 indicate that bond insurance with respect to the principal of and interest on the bonds will be purchased from a bond insurance company, if the interest cost savings on all or a portion of the bonds exceed the cost of such insurance. Apparently, under such insurance, the insurer would agree to pay the principal and interest to any bondholder should OCIA default on any payment thereof because of a failure of any succeeding Legislature to appropriate sufficient funds to retire part or all of the payments due under any bonds sold. We do not believe, if purchased, such insurance would constitute a prohibited gift. As noted, the two bond proposal resolutions provide insurance will only be purchased if its cost is less than the interest cost savings on all or a portion of the bonds. Thus, OCIA, the State and the public will reap an economic benefit from the purchase. In such a situation, the purchase of insurance cannot be considered a prohibited gift. See *In The Matter of The Petition of University Hospitals Authority*, 1997 OK 162, 953 P.2d 314, 320-321. We also believe both the State and the bondholders have an insurable interest subject to

PART III. BECAUSE NEITHER § 168.3 NOR § 301 ARE REVENUE BILLS THE STRICTURES OF OKLA. CONST. ART. 5, § 33 ARE NOT IMPLICATED.

¶ 11 Petitioners also contend §§ 168.3 and 301 were passed by the Legislature in violation of one or more of the strictures contained in OKLA. CONST. art. 5, § 33 which provides:

> A. All bills for raising revenue shall originate in the House of Representatives. The Senate may propose amendments to revenue bills.
>
> B. No revenue bill shall be passed during the five last days of the session.
>
> C. Any revenue bill originating in the House of Representatives shall not become effective until it has been referred to the people of the state at the next general election held throughout the state and shall become effective and be in force when it has been approved by a

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insurance protection. The State has a substantial economic interest in being better able to market bonds which are insured, rather than ones which are not insured, and the State obviously has an economic interest in seeing to it that such bonds are faithfully retired. A substantial economic interest of the bondholders exists in the form of protecting the safety and integrity of the money they have loaned to OCIA and insuring it will be paid back. Finally, our constitutional balanced budget provisions would not be violated by OCIA's purchase of a bond insurance policy, so long as no term of the policy creates a binding future obligation upon the State, such as the State agreeing to reimburse the bond insurance company for payments made by it to some or all of the bondholders because of a default on the part of OCIA to pay the bondholders by virtue of a lack of legislative appropriations. *See Dieck v. Unified School District of Antigo,* 165 Wis. 2d 458, 477 N. W. 2d 613, 621-622 (1991).

> majority of the votes cast on the measure at such election and not otherwise, except as otherwise provided in subsection D of this section.
>
> D. Any revenue bill originating in the House of Representatives may become law without being submitted to a vote of the people of the state if such bill receives the approval of three-fourths (3/4) of the membership of the House of Representatives and three-fourths (3/4) of the membership of the Senate and is submitted to the Governor for appropriate action. Any such revenue bill shall not be subject to the emergency measure provision authorized in Section 58 of this Article and shall not become effective and be in force until ninety days after it has been approved by the Legislature, and acted on by the Governor.

Because it is quite plain that neither § 168.3 nor § 301 are revenue bills within the contemplation of OKLA. CONST. art. 5, § 33, we assume for purposes of our disposition of this proposition that both statutes, as petitioners contend, were promulgated without meeting one or more of the strictures contained in § 33.

¶ 12 The accepted definition of a revenue bill falling under § 33 is the two-pronged test set forth in *Leveridge v. Oklahoma Tax Commission,* 1956 OK 77, 294 P.2d 809 *First Syllabus*: "[r]evenue [b]ills are those laws whose principal object is the raising of revenue and which levy taxes in the strict sense of the word, and said phrase does not cover laws under which revenue may incidentally arise." *See also Walters v. Oklahoma Tax Commission,* 1996 OK CIV APP 154, 935 P.2d 398, 401, *cert. denied* 118 S. Ct. 266, 139 L. Ed. 2d 192 (1997), *reh. denied* 118 S. Ct. 592, 139 L. Ed.

2d 428 (1997) (same) and Ramsey, *What is a 'Revenue Bill' Within the Meaning of Our Most Recent Constitutional Amendment*, 63 Okla. B.J. 1567 (1992). In no sense can either § 168.3 or § 301 be considered a revenue bill controlled by § 33.

¶ 13 The principal object of § 168.3 is to provide adequate and proper facilities for the Oklahoma School of Science and Mathematics. The principal object of § 301 is to provide adequate and proper facilities and/or equipment for various State agencies, departments and/or instrumentalities. More importantly, no tax at all is either levied or authorized to be levied by either enactment. Accordingly, petitioners' assertion that one or more of the strictures of OKLA. CONST. art. 5, § 33 were violated in relation to the passage of §§ 168.3 and 301 is without merit because neither statute is a revenue bill controlled by § 33.[8]

PART IV. CONCLUSION.

¶ 14 Neither § 168.3 nor § 301 are unconstitutional as authorizing debt in the constitutional sense because they only allow for the issuance of what are known as appropriation-risk or moral obligation bonds. Oklahoma constitutional balanced budget provisions are, thus,

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[8] We note that our decision in *Application of Oklahoma Capitol Improvement Authority*, 1998 OK 25, 958 P.2d 759, *cert. denied* 119 S. Ct. 174, 142 L. Ed. 2d 142 (1998) foreshadowed an understanding that statutes authorizing appropriation-risk or moral obligation bond measures like that at issue here are not revenue bills within the meaning of OKLA. CONST. art. 5, § 33. 958 P.2d at 762 f. n. 5.

inapplicable. Further, neither provision is a revenue bill controlled by OKLA. CONST. art. 5, § 33 because their principal object is not the raising of revenue, but to provide adequate facilities and/or equipment for State agencies, departments and/or instrumentalities and, more importantly, no taxes are levied or authorized to be levied by either statute. Finally, the two proposed bond issues in the total amount of $165 million dollars sought to be approved by OCIA are valid as authorized by either § 168.3 or § 301.

¶ 15 ORIGINAL JURISDICTION ASSUMED; 73 O.S. SUPP.1998, § 168.3 AND § 301 AND BOND PROPOSAL ISSUES HELD CONSTITUTIONAL.[9]

¶ 16 Any petition for rehearing in regard to this matter shall be filed by noon, Tuesday, July 6, 1999.

¶ 17 SUMMERS, C.J., HARGRAVE, V.C.J., HODGES and SIMMS, JJ., concur.

¶ 18 KAUGER and WATT, JJ., concur specially.

¶ 19 LAVENDER, J., concurring in part; dissenting in part.

¶ 20 OPALA and WILSON, JJ., dissenting.

¶ 21 As to ¶ 16 of opinion – HARGRAVE, V.C.J. and OPALA, J., not voting.

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[9] We note that by this Court's Order filed in this matter on April 20, 1999, we previously denied the December 29, 1998 motion of petitioners for recusal and disqualification of all members of this Court. That order is to be published contemporaneously with this opinion.

¶ 1 KAUGER, J. with whom Summers, C.J. and Watt, J. join, concurring specially:

¶ 2 I agree with the majority that the proposed bond issues are constitutional within the meaning of the Okla. Const. art. 5, § 33[1] and art. 10, §§ 23,[2]

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[1] The Okla. Const. art. 5, § 33 provides:

"A. All bills for raising revenue shall originate in the House of Representatives. The Senate may propose amendments to revenue bills.

B. No revenue bill shall be passed during the five last days of the session.

C. Any revenue bill originating in the House of Representatives shall not become effective until it has been referred to the people of the state at the next general election held throughout the state and shall become effective and be in force when it has been approved by a majority of the votes cast on the measure at such election and not otherwise, except as otherwise provided in subsection D of this section.

D. Any revenue bill originating in the House of Representatives may become law without being submitted to a vote of the people of the state if such bill receives the approval of three-fourths (3/4) of the membership of the House of Representatives and three-fourths (3/4) of the membership of the Senate and is submitted to the Governor for appropriate action. Any such revenue bill shall not be subject to the emergency measure provision authorized in Section 58 of this Article and shall not become effective and be in force until ninety days after it has been approved by the Legislature, and acted on by the Governor."

[2] The Okla. Const. art. 10, § 23 provides in pertinent part:

"The state shall never create or authorize the creation of any debt or obligation, or fund or pay any deficit,

24[3] and 25.[4] I also acknowledge that the language contained in the legislative enactments relating to the bond proposals is characteristic of that found in moral-obligation or appropriation-risk bonds. However, these bond proposals are not protected from attack merely through artful drafting. It is unnecessary to determine the character of the obligation created because these are traditional, self-liquidating proposals historically upheld by this

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against the state, or any department, institution or agency thereof, regardless of the form, or the source of money from which it is to be paid, except as may be provided in this section and in Sections 24 and 25 of Article X of the Constitution of the State of Oklahoma. . . . "

[3] The Okla. Const. art. 10, § 24 provides in pertinent part:

"In addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection or to defend the State in war . . . "

[4] The Okla. Const. art. 10, § 25 provides in pertinent part:

"Except the debts specified in sections twenty-three and twenty-four of this article, no debts shall be hereafter contracted by or on behalf of this State, unless such debt shall be authorized by law for some work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty-five years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election. . . . "

Court's jurisprudence. *Stare decisis* demands their approval.

¶ 3 The majority opinion recognizes that the bonds are intended to fund "building projects for the Oklahoma School of Science and Mathematics" and other "projects ranging from construction of a new building for the J.D. McCarty Center for Children with Developmental Disabilities to the purchase of computer hardware and software for the Oklahoma Department of Central Services."[5] These are precisely the types of projects this Court has traditionally found constitutional under the Okla. Const. art. 10, §§ 23, 24 and 25.

¶ 4 In *Application of Oklahoma Capitol Improvement Auth.*, 1966 OK 6, 410 P.2d 46, and *Application of Oklahoma Capitol Improvement Auth.*, 1960 OK 2097, 355 P.2d 1028, 1031, we characterized bonds for state office buildings as self-liquidating because the Legislature appropriated to the tenant state agencies monies sufficient to pay the rent which would amortize the bonds. Although no revenues derived from sources outside state appropriations were involved, the 1960 Court found that the bonds for state office buildings were self-liquidating. In both cases, "self-liquidating" entailed putting enough state dollars in one pocket to support the rental payments which had to be

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[5] See, ¶ 7, majority opinion. Subsection A(13) of 73 O.S. Supp. 1998 § 301 provides for a maximum of $3 million for the implementation of the Boll Weevil Eradication Act with debt retirement payments to be made by the Department of Agriculture. However, this program provides an avenue for economic support through self-assessments on cotton growers. See, 2 O.S. Supp. 1997 §§ 3-50.9, 3-50.9a, 3-50.10 and 3-50.11.

made from the other pocket. The construction projects here, like those at issue in *Application of Oklahoma Capitol Improvement Auth.*, 1966 OK 6, 410 P.2d 46, and *Application of Oklahoma Capitol Improvement Auth.*, 1960 OK 2097, 355 P.2d 1028, 1031, involve arrangements where state buildings are rented by state agencies pursuant to multi-year leases – scenarios approved in both the causes and identical to that of the capital and construction projects provided for in 73 O.S. Supp. 1998 § 301.[6]

¶ 5 To the extent that the bond proposal provides for the purchase or upgrade of computer or other equipment, its constitutionality is also supported by our prior decisions. In *U.C. Leasing, Inc.* v. *State* ex rel. *State Bd. of Public Affairs*, 1987 OK 43, 737 P.2d 1191, 1195, we upheld a lease covering communications switching equipment. In *Indiana Nat'l Bank* v. *State Dept. of Human Services*, 1993 OK 101, 857 P.2d 53, 57, a lease for computer equipment was held constitutional against a debt-limitation attack.

¶ 6 The existence of language in the statute and in the bond proposals which might be construed as merely creating a moral obligation of their payment is irrelevant to the holding that the bonds do not create a prohibited debt within the meaning of the Okla. Const. art. 10, §§ 23, 24 and 25. Approval of the bonds is required based on Oklahoma's constitutional and statutory law and our controlling precedents – all of which provide bona fide,

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[6] Title 73 O.S. Supp. 1998, § 301, see majority opinion, note 8, supra.

separate, adequate and independent grounds for this decision.[7]

Watt, J. concurring specially:

¶ 1 I join Justice Kauger in her specially concurring opinion. I write, however, to make clear my conclusion that my dissent in *In Re: Oklahoma Capitol Improvement Authority*, 1998 OK 25 ¶¶ 1-2, 958 P.2d 759, has nothing to do with the facts of the case at bar.

¶ 2 Although Justice Lavender has cited to my dissent in *Oklahoma Capitol Improvement Authority* at ¶ 10 of his opinion concurring in part and dissenting in part, I do not believe that my analysis in my dissent applies here. I dissented there because the roads being financed by the bonds in that case produced no revenues with which the bonds could be repaid. Here, however, as Justice Kauger observed in her specially concurring opinion, at ¶ 2, "It is unnecessary to determine the character of the obligation created because these are traditional, self-liquidating proposals historically upheld by this Courts jurisprudence. *Stare decisis* demands their approval." For this reason I believe there is ample authority other than *Oklahoma Capitol Improvement Authority* supporting the conclusion that the bonds at issue here are constitutional. Thus, I see no

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[7] *Michigan* v. *Long*, 463 U.S. 1032, 1042, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201, 1214 (1983).

reason to dissent to the majority opinions approval of the bonds at issue here and decline to do so.

1999 OK 64

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

JERRY R. FENT and MARGARET B. FENT, husband and wife, as resident taxpayers and voters of the State of Oklahoma,	No. 92,390
Petitioners,	**For Official Publication**
v.	
OKLAHOMA CAPITOL IMPROVEMENT AUTHORITY, a body corporate and politic of the STATE OF OKLAHOMA,	(Filed Jun. 28, 1999)
Respondent.	

LAVENDER, J., concurring in part; dissenting in part, with whom OPALA and WILSON, JJ., join:

¶ 1 I concur in the majority opinion to the extent it holds neither 73 O. S. Supp. 1998, § 168.3 nor 73 O. S. Supp.1998, § 301 are controlled by the strictures of OKLA. CONST. art. 5, § 33. The statutes before us, as the majority opinion correctly holds, are not revenue bills within the meaning of § 33. They are not revenue bills governed by § 33 for the simple reason no taxes are levied or authorized to be levied by either statute. *See Leveridge v. Oklahoma Tax Commission*, 1956 OK 77, 294 P.2d 809 *First Syllabus*. Only statutes which levy taxes in the strict sense are considered revenue bills controlled by § 33. *Id.*

¶ 2 I must, however, dissent to the majority's holding that §§ 168.3 and 301 do not violate OKLA. CONST. art. 10, §§ 23 and 25, Oklahoma's constitutional balanced budget provisions. I believe the statutes and the bonds which they authorize are unconstitutional because together they authorize massive borrowing (over $300 million dollars) by the State of Oklahoma and the legislative body authorizing the borrowing had every intent of binding future legislative assemblies to repay the money borrowed. In my opinion, such borrowing, with an express legislative intention to repay from future legislative appropriations, falls well within the confines of prohibited debt forbidden by this State's balanced budget provisions, in the absence of approval by Oklahoma's voters at the polls. To sanction this massive borrowing is to mortgage the futures of succeeding generations of Oklahomans – i.e. this State's children and grandchildren – for present expediency and is nothing less than deception by artful subterfuge or sophistry. Future generations should not be saddled with this debt until and unless they or their parents vote to sanction it, as is required by our fundamental constitutional law.

¶ 3 As I said last year in my dissent in *Application of Oklahoma Capitol Improvement Authority*, 1998 OK 25, 958 P.2d 759, 763, *cert. denied* 119 S. Ct. 174, 142 L. Ed. 2d 142 (1998) when this Court is called upon to construe "the provisions of the Oklahoma Constitution, we must give effect to the intent of its framers and of the people who adopted it." 958 P. 2d at 778 (Lavender, J. dissenting), relying on *Boswell v. State*, 181 Okla. 435, 74 P. 2d 940, 942 (1937). Further, when a constitutional provision is unambiguous, courts are not at liberty to search for its meaning

beyond the instrument itself. *Id.* The words of any constitutional provision must be given their ordinary and natural meaning. The intent of OKLA. CONST. art. 10, § 23, coupled with OKLA. CONST. art. 10, § 25, is that Oklahoma governmental projects – including the projects authorized by §§ 168.3 and 301 – are to be funded on a cash basis, i.e. on a fiscal year plan, and that long-term State debt reaching beyond the fiscal year may only be incurred by a vote of the people at the polls, including approval of some type of direct annual tax sufficient to pay the principal and interest on such a debt. 958 P. 2d at 778-779 (Lavender, J., dissenting). Here, we have such long-term debt, but no vote of the people and no specification of any direct annual tax to pay for the debt. In plain and simple terms, §§ 168.3 and 301 were intended to violate, and have the effect of offending, our constitutional debt-limitation provisions. I am unable to give my approval to such a disregard of our fundamental law.

¶ 4 The majority says the massive borrowing, which will be paid back by subsequent fiscal year appropriations, is not debt in the constitutional sense because the bonds authorized by §§ 168.3 and 301 are merely what are known as appropriation-risk or moral obligation bonds, i.e. there is no commitment that binds future legislative assemblies to repay the bondholders. I do not agree.

¶ 5 Although this Court is not authorized to delve into the wisdom, need, or desirability of a legislative enactment [*Oklahoma Industries Authority v. Barnes*, 1988 OK 98, 769 P. 2d 115, 119], we are authorized to look at, in fact we must look at, what the Legislature intended by its legislative provision. *Oklahoma Ass'n for Equitable Taxation v. City of Oklahoma City*, 1995 OK 62, 901 P. 2d 800, 803,

cert. denied 516 U.S. 1029, 116 S. Ct. 674, 133 L. Ed. 2d 523 (1995) (determination of intent controls statutory interpretation). To ascertain what the Legislature intended, one should look to the language of the statutes under review and presume the legislative body intends what it expresses. *Affiliated Management Corp. v. Okla. Tax Com'n*, 1977 OK 183, 570 P. 2d 335, 337. Further, words in a statute are given their plain and ordinary meaning (just as with constitutional provisions), except when a contrary intention plainly appears [*In re Guardianship of Campbell*, 1966 OK 99, 450 P. 2d 203, 206] and the words of a statute should generally be assumed to be used by the law-making body as having the same meaning as that attributed in ordinary and usual parlance. *Matter of Income Tax Protest of Ashland Exploration, Inc.*, 1988 OK 23, 751 P. 2d 1070, 1073. Finally, this Court recognized over sixty (60) years ago that, whether a statute authorizes a debt of the State contrary to our constitutional balanced budget provisions is a judicial question and not a legislative one. *Boswell v. State, supra*, 74 P. 2d at 943.

¶ 6 When I read §§ 168.3 and 301 it is obvious to me from the plain language used by the legislative body that it was intended by those statutes to create a debt. **A review of §§ 168.3 and 301 reveals that the following words or phrases – "indebtedness", "indebtedness created", "debt created", "debt retirement", "obligations" and "debt service" – are used in those legislative enactments a total of thirty-eight (38) times to refer to the bonds which are authorized to be sold by the Oklahoma Capitol Improvement Authority (OCIA) or to the bonds' repayment.** Further, both statutes contain a direct expression of legislative intent to appropriate sufficient monies

to retire the **debt or obligations** authorized to be created. § 168.3(B) and § 301(B). Without a vote of the people and their sanction of a direct annual tax to pay off a multi-year debt as required by OKLA. CONST. art. 10, § 25, multi-year **debts or obligations** are strictly forbidden by OKLA. CONST. art. 10, § 23, in the following pertinent language:

> **The state shall never create or authorize the creation of any debt or obligation,** or fund or pay any deficit, against the state, or any department, institution or agency thereof, regardless of its form or the source of money from which it is to be paid, except as may be provided in this section and in Sections 24 and 25 of Article X of the Constitution of the State of Oklahoma.[1] (emphasis added)

¶ 7 The plain and ordinary meaning of the terms debt and obligation are as follows: debt is "something owed"; obligation is "a commitment (as by a government) to pay a particular sum of money". WEBSTER'S NEW COLLEGIATE DICTIONARY 289 and 785 (1979). Giving such terms their plain and ordinary meanings it is beyond question, at least in my view, that §§ 168.3 and 301 were intended by the Legislature to authorize the creation of debts or obligations, i.e. to exhibit a commitment to have future legislative bodies appropriate monies to pay off the holders of any bonds sold. In my opinion, no amount of

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[1] OKLA. CONST. art. 10, § 24 authorizes the State to contract debts to repel invasion, to suppress insurrection or to defend the State in war. No one argues the applicability of that provision in this case and it is obviously inapplicable to the statutes and bonds currently subject to review.

legal semantics, word-massaging or linguistic subterfuge can turn this express commitment into some non-enforceable moral obligation to repay. To rule otherwise this Court must hold the Legislature does not mean debt when it says debt, does not mean obligation when it says obligation, and does not mean indebtedness when it says indebtedness. I am unwilling to engage in such interpretative gymnastics because to do so would ignore the plain meaning of the statutes before us and would disregard the obvious reality that future legislatures will appropriate monies to pay back the millions of dollars borrowed from the bondholders.

¶ 8 I also must distinguish the situation evident in the instant matter from those cases where this Court has approved multi-year leases of office equipment that were subject to termination on a year-to-year basis if insufficient legislative appropriations are made to make any particular year's lease payments. *See Indiana Nat. Bank v. State Dept. of Human Services*, 1993 OK 101, 857 P.2d 53; *U.C. Leasing, Inc. v. State ex rel. State Bd. of Public Affairs*, 1987 OK 43, 737 P.2d 1191. In the multi-year lease cases, if insufficient legislative appropriations are made, the equipment is merely returned to the lessor, the lease is at an end and no further payments are due to the lessor. Here the State, through OCIA, is purchasing equipment and land, and constructing buildings and other facilities that will immediately be owned by the State. Such equipment and facilities cannot merely be given back to a lessor or vendor upon default in paying the bondholders and have the debt created in favor of the bondholder come to an end. Here the debt owed to the bondholders remains until it is repaid.

¶ 9 Further, although some of the projects funded by the monies generated from sale of the bonds involved here might generate sufficient revenue to be considered self-liquidating under our previous jurisprudence[2] no attempt has been made in the legislation before us to identify such projects. Instead, the enactments at issue, in express terms, rely on general revenue legislative appropriations to pay back the money borrowed from the bondholders. I, therefore, find the following language from Justice Opala's dissent in *Application of Oklahoma Capitol Improvement Authority, supra,* to state my view as to why the situation here cannot be considered to be self-liquidating:

> The undeniable fact in the scheme used here for repayment is that there is a total reliance on legislative appropriations. The project cannot generate any tangible revenue of its own. There is no possibility of repayment without dependence on annual legislative appropriations. This alone prevents the proposed transaction from qualifying as a 'self-liquidating' project's obligation.

958 P.2d at 781. As Justice Opala also correctly pointed out in the same dissent, the state is simply not authorized to accept – without an antecedent approval by a vote of the people – the proceeds of a loan that will not pass muster as a "self-liquidating" project's obligation. *Id.* at 779.

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[2] *See e.g. Baker v. Carter,* 165 Okla. 116, 25 P. 2d 747 (1933) (dormitory bonds to be retired from rents and fees paid by student users).

¶ 10 The sanctioning of the instant bond issue and the court's approval of the highway bond issue last year in *Application of Oklahoma Capitol Improvement Authority, supra,* have completely obliterated our fundamental balanced budget provisions. The court has now, in essence, given its approval to over $450 million in debt that will be paid back out of future general revenue legislative appropriations without a vote of the people as required by our Constitution. How many hundreds of million dollars more will be borrowed in this manner before it is realized the legislation before us, or that of a similar ilk, creates a debt in contravention of Oklahoma's constitutional fabric? The answer, I fear, lies in the prediction of my colleague, Justice Watt, when in dissent to the denial of rehearing in *Application of Oklahoma Capitol Improvement Authority, supra,* the highway bond case, he stated in the following language:

> The majority . . . by its vote today, sanctions the State's use of long-term debt financing without a vote of the people. The actions of the Legislature – and of the majority of this Court in ratifying them – do not simply whittle away at the clear protecting mandates of Article 10, §§ 23 and 25 of the Oklahoma Constitution, their actions gut the State's balanced budget amendments. Pursuant to the majority's rationale, the State will *never* create a legally binding obligation against itself if it issues bonds that contain certain "magic" language disavowing the creation of any such debt, regardless of the economic realities of the situation. No decision of this Court should rest upon such a fallacy.
>
> What is particularly disturbing about the ratification of the current bond issue is that this

> is just the tip of the iceberg. Our citizenry would be well advised to prepare for future large-scale deficit financing of capital projects by State officials. Approximately two-thirds of the on-going one billion dollar road improvement legislation will be financed via these so-called "moral obligation" bonds. There is evidence in the record that suggests similar bonds for prison construction is next. The majority's decision will serve as no legal impediment for the issuance of "moral obligation" bonds for *any* capital improvement project. The taxpayers will eventually be called upon to foot the bill. (emphasis in original)

958 P. 2d at 795.

¶ 11 Indeed, the taxpayers will foot the bill – without their approval as required by the clear, unambiguous and plain meaning of our fundamental law. I cannot sanction such a result and, therefore, dissent to that part of the majority opinion holding that §§ 168.3 and 301 do not violate OKLA. CONST. art. 10, §§ 23 and 25, Oklahoma's constitutional balanced budget provisions.

OPALA, J., receding from the court's opinion and joining the dissenting view by **LAVENDER** and **WILSON, JJ.**

¶ 1 I recede from today's pronouncement for the reasons expressed in *Application of Oklahoma Capitol*

Improvement Authority (Opala, J., dissenting)[1] and join the dissenting view by Lavender, J.

ALMA WILSON, J., with whom LAVENDER and OPALA, JJ., join, dissenting:

¶ 1 The Oklahoma Capitol Improvement Authority may not borrow money that is to be repaid via legislative appropriations over a number of years unless the voters of Oklahoma have approved the law authorizing the debt.[1] Very simply, the Legislature stands accountable to the people before a debt-authorizing statute may be carried out. I cannot turn away the people's constitutional right to vote for or against the statutes before us today.[2]

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[1] 1998 OK 25, 958 P.2d 759, 779-82, *cert. denied* 119 S.Ct. 174, 142 L.Ed.2d 142 (1998).

[2] The Oklahoma Constitution, art. 10, § 25 provides that "no debts shall be hereafter contracted by or on behalf of this State, unless such debt shall be authorized by law for some work or object," . . . and "(n)o such law shall take effect until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election."

[3] Neither 73 O.S.Supp.1998, § 168.3, authorizing 6 million dollars in bonds for the Oklahoma School of Science and Mathematics, nor 73 O.S.Supp.1998, § 301, authorizing a total of 320 million dollars in bonds for a variety of state projects, have been submitted to a vote of the people. The Legislature has had nearly 8 years to submit the statute authorizing the 6 million dollar bond issue to a vote of the people. It was originally enacted by 1991 Okla. Sess. Laws, ch. 270, § 37, with a declared

Accordingly, I respectfully dissent to the approval of the instant bond proposals for all the reasons set forth in my dissenting opinions in *Application of Oklahoma Capitol Improvement Authority*, 1998 OK 25, 958 P.2d 759, 782, and 795, *cert. denied*, 119 S.Ct. 174, 142 L.Ed.2d 142 (1998). Further, I would allow at least ten days within which rehearing may be sought.

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effective date of July 1, 1991. And, the Legislature could have submitted the statute authorizing the issuance of 320 million dollars of bonds to a vote of the people at our general election in 1998. That statute was originally enacted by 1998 Okla. Sess. Laws, ch. 372, § 1, with a declared effective date of September 1, 1998.

APPENDIX C

1999 OK 64

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

JERRY R. FENT AND MARGARET B. FENT, husband and wife, as resident taxpayers and voters of the State of Oklahoma, Petitioners, v. OKLAHOMA CAPITOL IMPROVEMENT AUTHORITY, a body corporate and politic of the STATE OF OKLAHOMA, Respondent.	No. 92,390 FOR OFFICIAL PUBLICATION (Filed Jul. 13, 1999)

ORDER

¶1 The opinion in the above styled and numbered cause was promulgated on June 28, 1999. The petitioners, Jerry R. Fent and Margaret B. Fent (collectively, Fent/petitioners), filed a petition for rehearing on July 2, 1999. Upon consideration of the arguments presented by the petitioners, THE COURT FINDS that the petition for rehearing should be denied.

¶2 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 13th DAY OF JULY, 1999.

/s/ Hardy Summers
CHIEF JUSTICE

¶3 SUMMERS, C.J., HARGRAVE, V.C.J., HODGES, SIMMS, KAUGER, WATT, JJ. concur.

¶4 LAVENDER, OPALA, WILSON, JJ. dissent.

1999 OK 64
IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

JERRY R. FENT and MARGARET B. FENT, husband and wife, as resident taxpayers and voters of the State of Oklahoma,	)	
Petitioners,	)	No. 92,390
v.	)	FOR OFFICIAL PUBLICATION
OKLAHOMA CAPITOL IMPROVEMENT AUTHORITY, a body corporate and politic of the STATE OF OKLAHOMA,	)	(Filed Jul. 13, 1999)
Respondent.	)	

ALMA WILSON, J., with whom OPALA, J., joins, dissenting to denial of rehearing:

¶1 On rehearing, petitioners seek full consideration of the proposed financial guaranty insurance policy to be purchased by the Oklahoma Capitol Improvement Authority in order to enhance the credit of the proposed bonds. Petitioners earlier urged the invalidity of such an insurance policy. The per curiam opinion herein noted the challenge, concluding that such an insurance policy would not violate our constitutional balanced-budget provisions "so long as no term of the policy creates a binding future obligation upon the State, such as agreeing to reimburse the bond insurance company for payments made by it to some or all of the bondholders because of

default . . . by virtue of a lack of legislative appropriations."[1] The footnote in the per curiam opinion simply does not resolve the issue created by the proposed credit enhancement insurance policy – its effect upon the entire bond proposal – for which the petitioners seek rehearing.

¶2 To enhance the credit of the 1998 series highway bonds approved in *Application of Oklahoma Capitol Improvement Authority*, 1998 OK 25, 958 P.2d 759, the Oklahoma Capitol Improvement Authority paid a $454,000.00 premium for a financial guaranty insurance policy issued by MBIA Insurance Corporation.[2] According to the "Tax Certificate" issued by MBIA Insurance Corporation to the Capitol Improvement Authority regarding the 1998 series highway bonds, the insurance company assumed an unconditional obligation to pay bondholders with the expectation that it would **not** be called upon to make any payment under the policy and, if it did, with the expectation that it would secure reimbursement through legal remedies.[3] Under general rules of contract law, the terms of this "Tax Certificate" may be considered as part of the entire agreement relating to the transaction.[4]

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[1] 1999 OK 64, ¶10, footnote 7.

[2] Attachment to Reply Brief of Petitioners filed May 13, 1999.

[3] Attachment to Reply Brief of Petitioners filed May 13, 1999.

[4] *Sunrizon Homes, Inc. v. American Guaranty Investment Corp.*, 1988 OK 145, 782 P.2d 103; *Pierce Couch Hendrickson Baysinger & Green v. Freede*, 1997 OK 33, 936 P.2d 906; and 15 O.S. 1991, § 157.

¶3 In *Application of Oklahoma Capitol Improvement Authority*, 1998 OK 25, 958 P.2d at 775, the majority of this Court explained that the proposed highway bonds would not be legally enforceable debts of the State because the bondholders would have nothing to recover if future legislative appropriations are not made and therefore the Authority does not have the monies to retire the bonds. The financial guaranty insurance policy might drastically alter this conclusion. The bondholders will have recovery under the unconditional promise of the insurer, and, the insurer expects to have the right to seek reimbursement from the State. It appears that the financial guaranty insurance policy transfers the bondholders' appropriation risk to the State by virtue of the expectation of the insurer of the 1998 series highway bonds that the burden to repay the long-term debt created by the bonds will ultimately fall on the State of Oklahoma. The transfer of the appropriation risk from the bondholders to the State was not contemplated by this Court's approval of the proposed 1998 series highway bond issue.

¶4 The state constitution prohibits the creation of debts that are enforceable in the future against the state unless the electorate has given its prior approval of such long-term indebtedness.[5] The identity of the party – bondholder or insurer – entitled to future enforcement of the debt against the state is without constitutional import. Accordingly, rehearing should be granted for further consideration of the entire bond proposal to determine whether the credit enhancement will in fact place

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[5] Oklahoma Constitution, art. 10, §§ 23 and 25.

the future appropriation risk of the bonds squarely upon the State of Oklahoma.

¶5 The 1998 Annual Report by the Oklahoma State Bond Advisor[6] lists the State Highway Capitol Improvement Revenue Bonds, along with General Obligation Bonds, as "State of Oklahoma Tax-Supported Bonds" but categorizes the highway bonds as "Contractual Obligation Debts."[7] The Bond Advisor reports that the State of Oklahoma's Capitol Improvement Plan for fiscal years 2000-2004 identifies $2.52 billion in recommended capital improvements for projects to be funded by revenue bonds, federal funds, and dedicated state sources.[8] It seems inevitable that several more tax-supported revenue bond proposals will be submitted to this Court for approval, without prior approval by the electorate. The urgency in resolving the effect of the credit enhancement insurance policy on the instant bond proposal is obvious.

¶6 Further, the Bond Advisor reports that after the proposed highway bonds were approved by this court,[9] the United States Government filed suit against the State of Oklahoma in the United States District Court for the Northern District of Oklahoma, alleging that the Sate is in default with respect to its obligation to make payments from legislative appropriations under a contract for the

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[6] This Court may take judicial notice of the State Bond Advisor's report. 12 O.S. 1991, § 2202.

[7] 1998 Annual Report, Oklahoma State Bond Advisor, p. 24.

[8] 1998 Annual Report, Oklahoma State Bond Advisor, p. 7.

[9] *Application of Oklahoma Capitol Improvement Authority*, supra, decided March 20, 1998, rehearings denied April 30, 1998.

construction of the Sardis Reservoir.[10] According to the Bond Advisor's report, the controversy concerns the meaning and effect of the following contract language:

> The parties agree that this contract is not an obligation of the State of Oklahoma for which the full faith and credit of the State of Oklahoma is pledged. Nothing herein shall be construed as legally obligating the Oklahoma Legislature to make any appropriation of funds.

The validity of the 1998 series highway bond proposal and the bond proposal herein rests upon a similar premise – that future legislatures are not obligated to make appropriations to repay the long-term bond debt. Rehearing should be granted so this Court may consider whether the outcome of the Sardis Reservoir federal litigation may have a direct impact on the appropriation risk and hence the full faith and credit of the State of Oklahoma as to the instant bond proposal.

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[10] 1998 Annual Report, Oklahoma State Bond Advisor, p. 17, reports the United States Government filed the suit on July 14, 1998, and lists the Sardis Reservoir contract, same as the 1998 series highway bonds, as a "State of Oklahoma Tax-Supported Debt" in the category of "Contractual Obligation Debts."